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Office of Administrative Law Judges
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Issue date: 12Mar2001

CASE No.: 2000-BLA-00689

In the Matter of:

PETER P. LAWSON
Claimant

v.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

Helen M. Koschoff, Esq.
For the Claimant

Maureen A. Russo, Esq.
For the Director

Before: Ainsworth H. Brown
Administrative Law Judge

**DECISION AND ORDER DENYING BENEFITS
ON MODIFICATION**

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq (the Act). The Act provides benefits to persons totally disabled due to pneumoconiosis and to certain survivors of persons who had pneumoconiosis and were totally disabled at the time of their death or whose death was caused by pneumoconiosis. Pneumoconiosis is a chronic dust disease of the lungs, including respiratory and pulmonary impairments arising out of coal mine employment, and is commonly referred to as black lung.

On April 26, 2000, the Director, Office of Workers' Compensation Programs, referred this case to the Office of Administrative Law Judges for a formal hearing. DX -156. A hearing was held before me in Reading, Pennsylvania on September 13, 2000, at which time all parties were given a full opportunity to present evidence¹ and argument as provided in the Act and the Regulations issued thereunder, found at Title 20, Code of Federal Regulations. The Director was granted leave to submit medical evidence, with Claimant permitted to proffer rebuttal evidence. TR at 24. On January 2, 2001, the Director filed a post-hearing brief.²

ISSUES

Claimant has been credited with eleven years of qualifying coalmine employment, and found to be afflicted with coal workers' pneumoconiosis. These issues are therefore not contested. See DX-156. The following are at issue in this case, however:

- (1) whether Claimant suffers from a totally disabling pulmonary or respiratory impairment;
- (2) whether Claimant's total disability is due to pneumoconiosis;
- (3) whether Claimant has established either a mistake in determination of fact or a change in condition; and
- (4) whether reopening this claim on modification would render justice under the Act.

For the reasons stated herein, I find that Claimant has failed to establish entitlement to benefits on modification. Claimant, first, has failed to adduce persuasive evidence that the previous denial of benefits constitutes a mistake in determination of fact or that the record supports a change in condition. I therefore conclude that reopening this claim on modification on the basis of a mistake in determination of fact would not render justice under the Act, and that Claimant has failed to establish a change in conditions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background and Procedural History

Peter P. Lawson, Claimant, was born on July 12, 1929. DXs-1, 12. He was married to Elizabeth Jane Dower on January 12, 1952, DX-14, and they remain together. TR at 26. She is Claimant's dependent for purposes of possible augmentation under the Act.

While the case was pending a decision new regulations were promulgated. There was litigation contesting their legality. I find that the new regulations will not change the outcome of this matter as the breathing studies took place prior to January 19, 2001 and the criteria for evaluating treating medical opinion are not materially different from that employed herein.

¹ The following references will be used herein: TR for transcript, CX for Claimant's exhibit, DX for Director's exhibit.

² The Director's post-hearing evidence was submitted on October 11, 2000.

This claim has an extensive procedural history. Claimant filed for benefits under the Act on June 14, 1989.³ DX-1. The claim was administratively denied on August 14, 1989, DX-29, and referred to the Office of Administrative Law Judges on May 1, 1990. DX-34. After a formal hearing was conducted on September 12, 1990, DX-56, this claim was denied by Administrative Law Judge Frank D. Marden in a Decision and Order issued on January 25, 1991. DX-57. On Claimant's appeal, the Benefits Review Board, while affirming certain findings, vacated the Decision and Order and remanded this claim to the Office of Administrative Law Judges. *Lawson v. Director, OWCP*, BRB No. 91-0810 BLA (Jan. 24, 1994)(unpub.). DX-62.

On remand, the administrative law judge again denied benefits, issuing the Decision and Order on Remand on February 21, 1995. DX-63. Claimant requested modification on May 12, 1995. DX-64. After the district director issued a Proposed Decision and Order Denying Request for Modification on August 21, 1995, DX-69, the claim was again referred to the Office of Administrative Law Judges for a formal hearing. DX-71. A second formal hearing was conducted on this claim on August 7, 1996, before Administrative Law Judge Robert D. Kaplan. DX-88. On March 4, 1997, Administrative Law Judge Kaplan issued a Decision and Order denying benefits on March 4, 1997, DX-89, and Claimant lodged another appeal with the Benefits Review Board. DX-90.

The Board dismissed this appeal because of Claimant's failure to file a Petition for Review. *Lawson v. Director, OWCP*, BRB No. 97-0851 BLA (Sept. 9, 1997)(Order); DX-95. Claimant filed a subsequent Request for Modification on January 27, 1998. DX-96. This petition was denied by the district director in a Proposed Decision and Order Denying Request for Modification, DX-101, and on Claimant's request was referred to the Office of Administrative Law Judges on May 11, 1998. DX-103. After a December 30, 1998, formal hearing, DX-134, Administrative Law Judge Robert D. Kaplan denied benefits in a Decision and Order issued on May 11, 1999. DX-135.

Claimant appealed this decision, and then moved for a remand in order to request modification. Over the Director's objection,⁴ the Board dismissed the appeal without prejudice, and remanded this claim. *Lawson v. Director, OWCP*, BRB No. 99-0898 BLA (Dec. 14, 1999) (Order); DX-147. The instant request for modification followed on December

³ Given the filing date of this claim, subsequent to the effective date of the permanent criteria of Part 718, (i.e. March 31, 1980), the regulations set forth at 20 C.F.R. Part 718 will govern its adjudication. Because Claimant's last exposure to coal mine dust occurred in the Commonwealth of Pennsylvania, DXs-2, 3, this claim arises within the territorial jurisdiction of the United States Court of Appeals for the Third Circuit. See *Broyles v. Director, OWCP*, 143 F.3d 1348, 21 BLR 2-369 (10th Cir. 1998).

⁴ The Director moved to dismiss this appeal as abandoned because Claimant had failed to file a Petition for Review. DX-142. After Claimant did not respond to a show cause order from the Board, directing the filing of a Petition for Review within ten days, the Director filed a second Motion to Dismiss. DX-144. In response, Claimant filed a Motion to Remand in order to pursue modification.

27, 1999. DX-148. On May 21, 2000, the district director issued a Proposed Decision and Order Denying Request for Modification, DX-154, and the claim was referred to the Office of Administrative Law Judges as noted above. DX-156.

Standard for Modification

Section 22 of the Longshore and Harbor Workers' Compensation Act provides in part that

upon his own initiative, or upon the application of any party ... on the ground of a change in conditions or because of a mistake in a determination of fact ... the [fact-finder] may, at any time ... prior to one year after the rejection of a claim, review a compensation case ...

33 U.S.C. § 922, as incorporated by 30 U.S.C. § 932(a) and implemented by 20 C.F.R. § 725.310.

Section 22 provides the sole avenue for changing otherwise final decisions on a claim. *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 295 (1995) (*Rambo I*); *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999), *aff'd.*, No. 99-1954, 2000 U.S.App. LEXIS 31354 (4th Cir. April 5, 2000).

Judicial authority requires a broad reading of Section 22, and neither the wording of the statute nor its legislative history supports a "narrowly technical and impractical construction." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255 (1971); *Branham v. BethEnergy Mines, Inc.*, 20 BLR 1-27, 1-31-33 (1996). Given its liberal application, it is clear that the petition seeking modification need not allege any specific ground for relief. See *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53 (3d Cir. 1995); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); accord *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); see generally *Fireman's Fund Insurance Company v. Bergeron*, 493 F.2d 545, 547 (5th Cir. 1974); H.Rep.No. 1244, 73d Cong., 2d Sess. 4 (1934).

While the modification procedure, and the adjudicator's authority to reopen the claim, is "easily invoked," *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 497, 22 BLR 2-1 (4th Cir. 1999) (*Stanley*), the decision whether to grant modification on the basis of a mistake in determination of fact is committed to the adjudicator's discretion. See *Kinlaw*, 2000 U.S.App. LEXIS 31354 at * 8-10, *aff'g* 33 BRBS 68 (1999); see also *Duran v. Interport Maintenance Co.*, 27 BRBS 8, 14 (1993) (Board reviews Section 22 findings under abuse of discretion standard). This is not to say that an administrative law judge or district director may simply deny a petition for modification on a whim. To do so would constitute an abuse of discretion as being arbitrary and capricious and unwarranted by the record.

The adjudicator must examine the record as a whole, see *Keating*, 71 F.3d at 1123, 20 BLR 2-53, render findings which must be supported by substantial evidence, and articulate a rationale for its decision, even though the decision on whether to reopen a claim is

committed to its discretion. Indeed, the adjudicator has the “has the authority, *if not the duty*, to reconsider all the evidence for any mistake of fact or change in condition,” *Worrell*, 27 F.3d at 230, 18 BLR 2-290 (emphasis added); see *Jessee*, 5 F.3d at 726, 18 BLR 2-26 (deputy commissioner “must” review request for modification), by examining “wholly new evidence, cumulative evidence, or merely [by] further reflection on the evidence initially submitted.” Moreover, if the evidence establishes that a claimant’s condition has worsened, modification will be appropriate because a claimant “should receive his benefits if and when he becomes entitled to them.” *Stanley*, 194 F.3d at 500 n. 4, 22 BLR 2-1.

In every instance, the party who seeks to reopen a claim on modification bears the burden of proof. *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 138-39 (1997) (*Rambo II*); *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 736, 17 BLR 2-64 (3d Cir. 1993), *aff’d* 512 U.S. 267 (1994); *Branham v. BethEnergy Mines, Inc.*

With this in mind, I turn to the merits of Claimant’s Request for Modification. While this decision is based on a *de novo* review and consideration of the administrative record as a whole, not all of the evidence that has been introduced prior to the instant request for modification, and has been set forth in the prior Decision’s, may again be listed except as required for an analysis of the current request for modification. See generally *Wheeler v. Apfel*, 224 F.3d 891, 895 n. 3 (8th Cir. 2000).

Further, given the progressive nature of pneumoconiosis, see *Eastern Associated Coal Corporation v. Director, OWCP*, 220 F.3d 250, 258 (4th Cir. 2000), the more recent evidence with respect to the nature and extent of Claimant’s pulmonary or respiratory disability would be the more probative of his condition at the time of the hearing. See *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); see also *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Entitlement to Benefits: In General

Entitlement to benefits depends upon proof of three elements: In general, a miner must prove that: 1) he has pneumoconiosis which 2) arose out of his coal mine employment and 3) is totally disabling. Failure to prove any of these requisite elements precludes a finding of entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc). Because Claimant has previously established the existence of coal workers’ pneumoconiosis, I must review the record as a whole to determine whether he has proven that he is totally disabled, 20 C.F.R. § 718.204(c); see *Carson v. Westmoreland Coal Company*, 19 BLR 1-16 (1994), *modified on recon.* 20 BLR 1-64 (1996); see also *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), and whether pneumoconiosis is a substantial contributor to any total pulmonary or respiratory disability. 20 C.F.R. § 718.204(b); *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

Total Respiratory Disability

The finding of the existence of a totally disabling respiratory or pulmonary impairment shall be made under the provisions of Section 718.204. In making this determination, I must evaluate all relevant evidence. See *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). A claimant shall be considered totally disabled if he is prevented from performing his usual coal mine work or comparable and gainful work. In the absence of contrary probative evidence, evidence which meets one of the Section 718.204(c) standards shall establish Claimant's total disability. See *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

According to § 718.204(c), the criteria to be applied in determining total disability include: 1) pulmonary function studies, 2) arterial blood gas tests, 3) a diagnosis of cor pulmonale with right-sided congestive heart failure, and 4) a reasoned medical opinion concluding total pulmonary or respiratory disability. I must also consider Claimant's testimony in all of the hearings to compare the medical opinion disability assessments against that testimony regarding the physical requirements of his usual coal mine work. See generally *Onderko v. Director, OWCP*, 14 BLR 1-2 (1988).

Pulmonary Function Studies

In order to demonstrate total respiratory disability on the basis of pulmonary function study evidence, a claimant may provide studies, which, accounting for sex, age, and height, produce a qualifying value for the FEV1 test, plus either a qualifying value for the FVC test, or the MVV test, or a value of FEV1 divided by the FVC less than or equal to 55 percent. "Qualifying values" for the FEV1, FVC and the MVV tests are measured results less than or equal to the values listed in the appropriate tables of Appendix B to 20 C.F.R. Part 718. See *Director, OWCP v. Siwiec*, 894 F.2d 635, 637 n. 5, 13 BLR 2-259 (3d Cir. 1990).

Assessment of the pulmonary function study results is dependent on the Claimant's height, which has been recorded between 66 and 69 inches. Considering this discrepancy, I find that Claimant's height is 67.6 inches for purposes of evaluating the pulmonary function studies. See *Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983).

The Secretary's regulations allow for the review of pulmonary function testing by experts who can review the ventilatory tracings and determine the validity of a particular test. 20 C.F.R. § 718.103 & Part 718, Appendix B; *Siwiec*; see generally *Ziegler Coal Co. v. Sieberg*, 839 F.2d 1280, 1283, 11 BLR 2-80 (7th Cir. 1988). Thus, in assessing the probative value of clinical study, an administrative law judge must address "valid contentions" raised by consultants who review such tests. See *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276, 18 BLR 2-42 (7th Cir. 1993); *Dotson v. Peabody Coal Co.*, 846 F.2d 1134, 1137-38 (7th Cir. 1988); *Strako v. Ziegler Coal Co.*, 3 BLR 1-136 (1981); see also *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985) (2-1 opinion with Brown, J., dissenting); accord *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986).

The Third Circuit has emphasized that the administrative law judge "must determine whether the test results meet the quality standards and whether the medical evidence is reliable[.]" *Siwiec*, 894 F.2d at 638, 13 BLR 2-259.

The record includes the following pulmonary function study evidence:

Ex. No.	Date	Age	HT.	FEV ₁	FVC	MVV	FEV ₁ /FVC	Qualify
DX-15	7/13/89	60	67"	2.91	4.15	103	70%	No

Dr. H. S. Ahluwalia, who is board-eligible in internal medicine, DX-35, found normal flows on spirometry except for results indicating "small airways involvement." Claimant's cooperation and comprehension were listed as "good." Dr. John J. Mika testified that these results were consistent with a mild airflow limitation. DX-38 at 10.

Ex. No.	Date	Age	HT.	FEV ₁	FVC	MVV	FEV ₁ /FVC	Qualify
DX-16	12/22/89	60	67.75"	1.75	1.89	61.37	93%	Yes

This test was administered at the William H. Ressler Center. A technician observed good cooperation and comprehension. It was invalidated by Dr. Leon Cander, who explained deficiencies in performance based on his review of the tracings, *viz.* excessive variations between FEV₁ tracings -- 23%, "breathholding" and a slowing of respiration in the FVC trial. DX-16. Dr. John J. Mika, in rebuttal, criticized Dr. Cander's report, and his review demonstrated a worsening condition. DX-18.

I find that, while this test conforms to the regulatory criteria, it is not a reliable. I have carefully considered Dr. Mika's dispute with the conclusions reached by Dr. Cander. Nevertheless, I credit the invalidation opinion of Dr. Cander on the basis of his credentials. He is board-certified in internal medicine and held an academic position at the Jefferson Medical College in Philadelphia at the time he rendered this consultation.⁵ DX-17. See *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); see generally *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

Ex. No.	Date	Age	HT.	FEV ₁	FVC	MVV	FEV ₁ /FVC	Qualify
DX-35	7/19/90	61	67"	3.12	4.51	89	69%	No

Dr. Ahluwalia interpreted this test as demonstrating "normal flows on spirometry without any evidence of obstructive airway disease." Claimant's cooperation in this test was listed as "fair." Dr. Mika, in a handwritten note dated October 20, 1990, criticized the irregularities in the administration of this test based on Claimant's representations about the protocol. DX-40. I have carefully reviewed this letter, and, it appearing that Dr. Mika does not invalidate this study on the basis of a review of the tracings or results, find it to be reliable.

Ex. No.	Date	Age	HT.	FEV ₁	FVC	MVV	FEV ₁ /FVC	Qualify
DX-39	8/22/90	61	68"	1.50	1.65	33	90%	Yes

⁵ The Board affirmed the administrative law judge's deference to Dr. Cander's invalidation opinion on this basis. DX-62 at 3. Because this matter is before the undersigned on modification, the previous evaluation of this evidence is not *res judicata*.

Dr. Raymond J. Kraynak interpreted this test as showing a “severe restrictive defect.” Claimant’s performance was listed by a technician as “good.” Dr. Kraynak’s professional background is in the area of osteopathic medicine, and he is board-eligible in family practice. DX-133. This test is in substantial compliance with the regulations.

Ex. No.	Date	Age	HT.	FEV ₁	FVC	MVV	FEV ₁ /FVC	Qualify
DX-64	4/26/95	65	68"	1.12	1.96	38	57%	Yes

Dr. Kraynak interpreted this test as showing a “severe restrictive defect.” This test was invalidated by Dr. Spagnolo, who found excessive variations in the trials. DX-69. Dr. Kraynak responded to Dr. Spagnolo’s review, maintaining that this test was valid, and criticized Dr. Spagnolo’s interpretation of the tracings on the basis of a photocopy.

I have duly noted Dr. Kraynak’s criticism of a review of a photocopy of the tracings. Despite Dr. Spagnolo’s impressive credentials, I am unable to credit his review of this test because there is no satisfactory explanation for the question on his invalidation form whether “the photocopies be interpreted[.]” DX-65. I find this test to be in substantial compliance with the regulations.

Ex. No.	Date	Age	HT.	FEV ₁	FVC	MVV	FEV ₁ /FVC	Qualify
DXs-71, 81	1/10/96	66	68"	1.53	2.46	54	62%	Yes

Dr. Raymond J. Kraynak interpreted this test as showing a “severe restrictive defect.” This test was invalidated by Dr. Sahillioglu, who is board-eligible in internal medicine and pulmonary diseases. DXs-72, 74. Dr. Sahillioglu explained that no inspiratory effort was demonstrated, and that the FVC and MVV results showed inconsistent effort. Dr. Sahillioglu also advised that a restrictive defect would need to be verified by a total lung capacity measurement. DX-72. Dr. Kraynak responded to this review, maintaining that this test was valid. DX-84. He disputed Dr. Sahillioglu’s interpretation of the tracings and as well as his conclusions about the TLC measurement, asserting that a total lung capacity determination is not a “regulatory requirement.” *Id.*

I find that this test is unreliable in view of Dr. Sahillioglu’s review. I credit this consultant on the basis of his superior credentials. *See Martinez; Dillon; Wetzel.* I further credit Dr. Sahillioglu’s opinion that a diagnosis of a restrictive defect required additional measurement.

As the Seventh Circuit noted in *Peabody Coal Co. v. Director, OWCP*, 972 F.2d 882, 16 BLR 2-129 (7th Cir. 1992) [*Brinkley*], “[a]lthough the tests [before it] were qualifying and conforming, they must also be valid.” 972 F.2d at 883, 16 BLR 2-129; *see generally Andruscavage v. Director, OWCP*, No. 93-3291 (3d Cir. Feb. 22, 1994) (unpub.) (Court affirms administrative law judge’s reliance on consultants who, in part, utilized this rationale). In short, I draw the inference from Dr. Sahillioglu’s review that the test did not provide sufficient data to support the interpretation of a restrictive defect.

Ex. No.	Date	Age	HT.	FEV ₁	FVC	MVV	FEV ₁ /FVC	Qualify
DX-72	1/29/96	66	67.75"	1.53	1.75	34.09	87%	Yes

A physician at the William H. Ressler Center interpreted this test as showing a “severe restrictive defect.” This test was invalidated by Dr. Sahillioglu because of inconsistent effort. DX-72. Dr. Kraynak responded to this review, maintaining that this test was valid. He rejected Dr. Sahillioglu’s views about inspiratory effort and TLC determination for restrictive defects. DX-84. I also find that this test is invalid on the basis of Dr. Sahillioglu, given his superior credentials. *See Martinez; Dillon; Wetzel.*

Ex. No.	Date	Age	HT.	FEV ₁	FVC	MVV	FEV ₁ /FVC	Qualify
DX-73	4/5/96	66	67"	2.74	3.87	83	70%	No

Dr. Ahluwalia reported inconsistent effort in the performance of this test. He found as well that the test indicated normal flows at Claimant’s best effort. “These were normal for [Claimant’s] age.” This test was invalidated by Dr. Kraynak, who opined that Dr. Ahluwalia failed to consider all of the evidence and criticized his reliance on an invalid test. DX-86. I will credit Dr. Kraynak’s unanswered invalidation of this ventilatory study.

Ex. No.	Date	Age	HT.	FEV ₁	FVC	MVV	FEV ₁ /FVC	Qualify
DX-85	6/12/96	66	68"	0.74	1.61	48	46%	Yes

This test was invalidated by Dr. Sahillioglu. Dr. Sahillioglu found this test unacceptable, with “no demonstration of inspiratory effort” and “inconsistent effort FVC’s and variable breaths MVV[.]” He further stated his view that a restrictive defect would need to be verified by a total lung capacity measurement. DX-74. Dr. Kraynak interpreted this test as showing a “severe restrictive defect.” Dr. Kraynak responded to this review, maintaining that this test was valid. As in prior instances, Dr. Kraynak disputed Dr. Sahillioglu’s interpretations of the tracings as well as the consultant’s views on the verification of a restrictive defect by TLC measurements and the need for showing inspiratory effort. DX-87.

I will accept Dr. Sahillioglu’s invalidation report on the basis of his credentials. *See Martinez; Dillon; Wetzel.* I will also credit his statement about the need for a total lung capacity for reasons stated previously.

Ex. No.	Date	Age	HT.	FEV ₁	FVC	MVV	FEV ₁ /FVC	Qualify
DX-98	1/26/98	68	68"	1.27	2.14	57	59%	Yes

Dr. Kraynak interpreted this test as showing a “severe restrictive defect.” This test was invalidated by Dr. Sahillioglu because of “no demonstration of inspiratory effort,” the presence of “inconsistent effort FVC’s and variable breaths MVV[.]” He further stated his view that a restrictive defect would need to be verified by a total lung capacity measurement. Dr. Kraynak responded to this review, maintaining that this test was valid.

I have carefully considered Dr. Kraynak’s rebuttal opinion. Nevertheless, I will accept Dr. Sahillioglu’s invalidation report on the basis of his credentials. *See Martinez; Dillon; Wetzel.* I will also credit his statement about the need for a total lung capacity for reasons stated previously.

Ex. No.	Date	Age	HT.	FEV ₁	FVC	MVV	FEV ₁ /FVC	Qualify
DX-120	3/26/98	68	68"	1.63	2.59	39	63%	Yes

This test was administered at the Wilkes-Barre VA Medical Center for Dr. Kim-Loan Vo, who is board-certified in internal medicine, pulmonary disease and critical care medicine.

CX-3. It was interpreted as demonstrating an "obstructive and restrictive lung defect." According to Dr. Vo, Claimant appeared to give good effort in the performance of this test, experienced shortness of breath, and was "light-headed[] and ... starved for air."

Dr. Michos, who is board-certified in internal medicine, invalidated this study for less than optimal effort. DX-113. His conclusions were disputed by Dr. Kraynak, who disagreed with Dr. Michos' reading of the tracings. Dr. Kraynak pointed out as well that Dr. Michos did not indicate that he had found the MVV results unacceptable, so that the test continued to demonstrate respiratory impairment. CX-8.

I find that this test is not valid on the basis of Dr. Michos' report, which I credit because of his superior credentials. *See Martinez; Dillon; Wetzel.*

Ex. No.	Date	Age	HT.	FEV ₁	FVC	MVV	FEV ₁ /FVC	Qualify
DX-123	4/15/98	66	68"	1.49	2.28	60	65%	Yes

The test was interpreted by Dr. Stephen Kruk as indicating "obstructive and restrictive defects." Dr. Michos invalidated this study, because its tracings showed suboptimal effort, DX-112, and Dr. Kraynak offered a rebuttal, deeming the test valid, pointing out that the MVV results were not challenged, and that the MVV would itself indicate disability. CX-8.

I will credit Dr. Michos' review of this study, over the rebuttal presented by Dr. Kraynak on the basis of Dr. Michos' qualifications. *See Martinez; Dillon; Wetzel.* Although Dr. Kruk, who administered this test, is board-certified in internal medicine, he does not respond to Dr. Michos' invalidation.

Ex. No.	Date	Age	HT.	FEV ₁	FVC	MVV	FEV ₁ /FVC	Qualify
DX-122	5/20/98	68	68"	1.05	1.76	50	60%	Yes

Dr. Kraynak found a "severe restrictive defect." Dr. Michos invalidated this study, in its entirety, marking the "Vents are not acceptable" selection on the review form, explaining as well that the tracings demonstrated less than optimal effort because of excessive variation in FEV and FVC trials, and Dr. Kraynak found it valid, especially the MVV results. CX-8. I find this test invalid on the basis of Dr. Michos' qualifications. *See Martinez; Dillon; Wetzel.*

Ex. No.	Date	Age	HT.	FEV ₁	FVC	MVV	FEV ₁ /FVC	Qualify
DX-105	7/13/98	69	68"	0.99	1.78	38	56%	Yes

Dr. Kraynak found a "severe restrictive defect." Dr. Ranavaya invalidated this study because of less than optimal effort. DX-105. Dr. Kraynak found it valid, disputing Dr. Ranavaya's claims. DX-125. I find this test invalid on the basis of Dr. Ranavaya's qualifications. *See Martinez; Dillon; Wetzel.*

Ex. No.	Date	Age	HT.	FEV₁	FVC	MVV	FEV₁/FVC	Qualify
DX-119	7/27/98	68	67.75	0.82	0.87	27.28	94%	Yes

Dr. Kraynak stated that this test exhibited a “severe restrictive defect.” Dr. Ranavaya, who is board-certified in occupational medicine, DX-107, invalidated this study because of less than optimal effort and because the test failed to meet “NIOSH/ATS reproducibility standards.”⁶ DX-106. Dr. Kraynak disputed Dr. Ranavaya’s interpretation of the tracings, as well as his reference to the NIOSH/ATS standards as being outside of the regulatory requirements for such tests. DX-128.

I find this test invalid on the basis of Dr. Ranavaya’s qualifications. See *Martinez, Dillon; Wetzel*. I do so not on the basis of the reference to the “NIOSH/ATS” standards, but because of Dr. Ranavaya’s alternate view that the study was performed with insufficient effort.

Ex. No.	Date	Age	HT.	FEV₁	FVC	MVV	FEV₁/FVC	Qualify
DX-104	9/3/98	69	66"	2.42	3.19	51	75%	No
	(post-bronchodilator)			2.37	3.18	55	74%	No

Dr. Kraynak reviewed this examination, and concluded that it was invalid because the irregularities in the tracings and suggested that the test measured improperly high results. DX-131 (Deposition) at 8. I accept Dr. Kraynak’s invalidation of this study.

Ex. No.	Date	Age	HT.	FEV₁	FVC	MVV	FEV₁/FVC	Qualify
DX-132	12/9/98	69	68"	0.83	1.80	65		Yes

Dr. Matthew J. Kraynak found a “severe restrictive defect.” Dr. Michos invalidated this study because of excessive variation between the two best FEV values, erratic performance, and less than optimal effort. DX-110. Dr. Kraynak rejected this criticism, found this test valid, and again asserted that the uncontested MVV values showed severe disability. CX-7.

Again, I have carefully evaluated Dr. Kraynak’s rebuttal. I find this test invalid, however, on the basis of Dr. Michos’ qualifications. See *Martinez, Dillon; Wetzel*.

Ex. No.	Date	Age	HT.	FEV₁	FVC	MVV	FEV₁/FVC	Qualify
DX-150	1/11/2000	70	68"	1.18	1.77	48	67%	Yes

Dr. Kraynak administered this study, and noted a “severe restrictive defect.” He recorded good effort, cooperation and comprehension in the performance of this test. This test was considered invalid by Dr. Sander J. Levinson, who detected “excessive variability of the FEV1’s” and “poor patient effort on MVV.” DX-151. Dr. Kraynak responded to Dr.

⁶ These are standards from the American Thoracic Society and the National Institute for Occupational Safety and Health.

Levinson, disagreed with his analysis, and insisted that the test was valid. CX-4 (Kraynak 7/21/2000 Deposition) at 6.

I credit the invalidation opinion of Dr. Levinson over the contrary conclusion of Dr. Kraynak that the test is acceptable, on the basis of Dr. Levinson's superior qualifications. DX-150. Dr. Kraynak's is board-eligible in family practice. Dr. Levinson is board-certified in internal medicine with a sub-specialty in pulmonary disease. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); see also *Martinez*; *Dillon*; *Wetzel*.

Ex. No.	Date	Age	HT.	FEV ₁	FVC	MVV	FEV ₁ /FVC	Qualify
CX-1	4/20/2000	70	68"	1.49	2.05	56	72%	Yes

Dr. Raymond Kraynak administered this study, and noted a "severe restrictive defect." He recorded good effort, cooperation and comprehension in the performance of this test. Dr. Michael S. Sherman, who is board-certified in internal medicine and pulmonary disease, DX-158, reviewed this test on August 13, 2000, and considered it valid. DX-157. Dr. Rashid, who is board-certified in internal medicine, also examined this study, and reached the opposite conclusion in an August 21, 2000 consultation, viewing this test to be invalid because the tracing was "jerky and unsteady." DX-160. Dr. Kraynak voiced his disagreement with Dr. Rashid's conclusion, in deposition testimony and in a written report to counsel, dated August 23, 2000. CX-4 (Kraynak 7/21/2000 Deposition) at 7; CX-9.

I credit Dr. Rashid's invalidation of the April 20, 2000 pulmonary function study that was administered by Dr. Kraynak. DX-160. Dr. Rashid is board-certified in internal medicine, DX-159, and thus possesses superior credentials than does Dr. Kraynak. See *Martinez*; *Dillon*; *Wetzel*.

I am mindful that Dr. Michael S. Sherman, who has impressive credentials, see DX-158, reviewed this test at the Director's behest and checked a form indicating that these "vent are acceptable." DX-157. Without more explanation, however, I will not accord Dr. Sherman's validation significant weight. In *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-269 (4th Cir. 1998), the Fourth Circuit ruled that a validation of an arterial blood gas study which consisted of a checked box "lent little additional persuasive authority" to that claimant's case. 138 F.3d at 530, 21 BLR 2-269.

Ex. No.	Date	Age	HT.	FEV ₁	FVC	MVV	FEV ₁ /FVC	Qualify
CX-5	8/1/2000	71	68	1.25	2.91	69	43%	Yes

Dr. Matthew Kraynak observed that Claimant's effort in the performance of this test was "good." Claimant also exhibited shortness of breath during the maneuver. Dr. Rashid invalidated this test, stating that it was performed with "poor cooperation as well as incorrect height." DX-161.

I will defer to Dr. Rashid's qualifications. However, I will not accord full credit to his review of this study. Dr. Rashid incorrectly criticizes the height recorded by Dr. Kraynak. I will infer from his statement regarding Claimant's cooperation that the study was invalid.

Ex. No.	Date	Age	HT.	FEV ₁	FVC	MVV	FEV ₁ /FVC	Qualify
DX-163	8/24/2000	71	66"	2.35	2.73	73		No

Dr. Rashid administered this study, and noted that Claimant was “dizzy” in his performance of this test. Dr. Rashid also noted that Claimant exhibited some “distress” before performing the procedure, but makes no other notation concerning Claimant’s comprehension or cooperation in the performance of this test.

Discussion

Upon reviewing the pulmonary function study evidence of record, I find that Claimant has not demonstrated total respiratory disability at § 718.204(c)(1) by a preponderance of the pulmonary function study evidence in the record as a whole.

I find that the most recent pulmonary function study, which was administered by Dr. Rashid on August 24, 2000, is entitled to considerable weight. Although the qualifying study conducted by Dr. Matthew Kraynak on August 1, 2000 is evidence of impairment, CX-5, its results are questioned to some extent by Dr. Rashid. DX-161. Moreover, I defer to Dr. Rashid’s most recent study as the most probative of the effort-dependent ventilatory tests of record. See *Baker v. North American Coal Co.*, 7 BLR 1-79 (1984); *Burich v. Jones & Laughlin Steel Corp.*, 7 BLR 1-1189 (1984), cited in *Andruscavage v. Director, OWCP*. I am mindful that the record contains valid qualifying tests. See DXs-39, 64. Nevertheless, these tests, as well as valid non-qualifying studies that were administered before the most recent request for modification, are not the most reliable indicators of the current state of Claimant’s pulmonary condition. See *Hicks*, 138 F.3d at 530, 21 BLR 2-269; *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988).

Arterial Blood Gas Studies

A claimant may demonstrate total disability with arterial blood gas tests which, accounting for altitude, demonstrate qualifying results as specified in Appendix C to 20 C.F.R. Part 718. 20 C.F.R. § 718.204(c)(2).

The current record contains the following blood gas studies:

Ex. No.	Date	Physician	Alt.	pCO ₂	pO ₂	Qualify
DX-20	7/13/89 (Post-exercise)	Ahluwalia	>2999	41	93	No
				34	97	No
DX-35	7/19/90 (Post-exercise)	Ahluwalia	>2999	43	96	No
				29	107	No
DX-73	4/05/96	Ahluwalia	>2999	30.1	104	No

None of the arterial blood gas test results demonstrate total respiratory disability at Section 718.204(c)(2). I therefore find that Claimant has failed to demonstrate total respiratory disability on the basis of the blood gas study evidence.

Cor Pulmonale

A claimant may demonstrate total disability with medical evidence of cor pulmonale with right-sided congestive heart failure in addition to pneumoconiosis. Dr. Kim-Loan Vo diagnosed cor pulmonale, but she does not elaborate on this diagnosis, and does not report that this condition is accompanied by right-sided congestive heart failure. DX-121.

Because there is no evidence of cor pulmonale with right-sided congestive heart failure, I am unable to find that Claimant has demonstrated total disability at Section 718.204(c)(3).⁷ 20 C.F.R. § 718.204(c)(3); see *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991).

Medical Opinion Evidence

Claimant may demonstrate total respiratory disability by a reasoned medical opinion which assesses total respiratory disability, if the opinion is based on medically acceptable clinical and laboratory diagnostic techniques. Claimant must prove his respiratory or pulmonary condition prevents him from engaging in his “usual coal mine employment or comparable and gainful employment.” 20 C.F.R. § 718.204(c)(4). Any loss in lung function may qualify as a total respiratory disability under Section 718.204(c). See *Carson*, 19 BLR at 1-21, *modified on recon.* 20 BLR 1-64 (1996).

The point of departure in evaluating this evidence is the principle that the opinions of treating physicians are entitled to deference in the overall evaluation of the medical record. See *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997). As has been pointed out by the Third Circuit in a Social Security case, “[a] cardinal principle guiding ... eligibility determinations is that the [administrative law judge] accord treating physicians’ reports great weight, ‘especially when their opinions reflect expert judgment based on a continuing observation of the patient’s condition over a prolonged period of time.’” *Morales v. Apfel*, 225 F.3d 310, 317 (3d Cir. 2000), quoting *Plummer v. Apfel*, 186 F.3d 422, 429 (3d Cir. 1999). Accordingly, I must bear in mind the deference that usually must be accorded the

⁷ The question of whether the record should have been developed further, to determine whether Claimant’s cor pulmonale was accompanied by right-sided congestive heart failure, was addressed in prior proceedings. In the event that a party determines at this juncture to develop medical evidence that should have been collected at a prior stage in this litigation, it may well be found that modification based on that evidence would not render justice under the Act. See *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 24-25, 14 BRBS 636 (1st Cir. 1982); *McCord v. Cephas*, 174 U.S. App. D.C. 302, 305-6, 532 F.2d 1377, 1380-81 (1976).

opinions of treating and examining medical experts, and will therefore view the medical opinions and professional judgments of Drs. Mika and Kraynak with some indulgence.

Dr. H. S. Ahluwalia concluded in a July 13, 1989 report that Claimant suffered from uncomplicated silicosis, assessed a mild airflow limitation and concluded that Claimant suffered no significant impairment. DX-19. Dr. Ahluwalia is board-eligible in internal medicine, and relied on a physical examination and clinical testing to support his conclusions.

Dr. Ahluwalia also examined Claimant on July 1, 1990. He recorded complaints of wheezing, dyspnea, a productive cough and nocturnal dyspnea. An examination of the chest revealed no crackles or wheezes. Clinical tests — pulmonary function and arterial blood gas studies - were deemed normal. Dr. Ahluwalia also administered a treadmill test. He concluded in the diagnosis portion of his report that Claimant had a “normal” cardio-pulmonary examination, except for “severe tachycardia on minimal exercise.” He ruled out coronary artery disease and concluded that there was no apparent “respiratory impairment.” DX-35.

Dr. Ahluwalia conducted another physical examination of Claimant on April 5, 1996, administered arterial blood gas and ventilatory studies, and reviewed a chest x-ray. He took note of Claimant’s breathing medications. The pulmonary function test which was administered in connection with this examination was performed with inconsistent effort. Dr. Ahluwalia reported his findings on physical examination as normal, and while he diagnosed simple pneumoconiosis and noted “marked anxiety,” found no objective evidence of impairment. DX-73.

Dr. John J. Mika, who is board-eligible in family medicine, DX-76, examined Claimant and issued a report on January 19, 1990. DX-18. He recorded a 15-year history of coal mine employment and described the physical demands of Claimant’s coal mine work. Dr. Mika opined that Claimant was severely disabled by anthracosilicosis and as a result was unable to return to his last coal mine work or work required similar labor. He reaffirmed these conclusions in deposition testimony recorded on August 20, 1990. DX-38. Dr. Mika emphasized that he was Claimant’s family physician, and had treated Claimant for 25 years. DX-38. He explained that Claimant’s complaints have all been related to the respiratory system, and concluded that Claimant “had all the classical signs of pulmonary emphysema.” DX-38 at 6-7.

Dr. Mika, in an October 22, 1995 letter report reiterated that Claimant was totally disabled, noting again that Claimant’s “only major problem has been respiratory insufficiency” and that Claimant was totally disabled. DX-75. In a letter dated October 18, 1990, Dr. Mika again emphasized his lengthy treatment history of Claimant, and criticized Dr. Ahluwalia’s findings that Claimant was not totally disabled. DX-40. In a letter dated March 14, 1997, Dr. Mika repeated his conclusion that Claimant is totally disabled, and opined that certain high values recorded on ventilatory testing reflected the “volumes of a college athlete.” DX-96.

Dr. R. M. Greco, in three letter reports, opined that Claimant was totally disabled and not fit for gainful employment. DXs-77-79. Dr. Greco is board-certified in internal medicine.

DX-80. On March 26, 1997, Dr. Greco again reported that Claimant is totally disabled. He detected no evidence of “underlying cardiac pathology, coronary disease or congestive heart failure.” He was “impressed by Claimant’s subjective complaints.” DX-96.

Dr. Raymond J. Kraynak, D.O., in a May 30, 1995 letter, opined that Claimant “has had a worsening of his condition[,]” and that he “continues to be totally and permanently disabled due to his coal workers’ pneumoconiosis.” DX-68. He reiterated this conclusion in a deposition, dated January 19, 1996, DX-82, and in medical reports dated June 20, 1996, DX-86, and on February 19, 1998 recorded a worsening of Claimant’s condition. DX-100. Dr. Kraynak testified that a cardiac work up had revealed “no cardiac etiology to Mr. Lawson’s complaints of shortness of breath, productive cough, and exertion[al] dyspnea.” DX-82 at 15.

Dr. Stephen M. Kruk, who is board-certified in internal medicine, examined Claimant, administered a stress test, and reported on April 15, 1998 that Claimant was permanently and totally disabled due to coal workers’ pneumoconiosis. He explained that Claimant “becomes extremely dyspneic with minimal exertion [emphasized that Claimant was] never a cigarette smoker [and has] no history of heart problems.” DX-123.

Claimant was examined by Dr. Rashid, who, while diagnosing a “minimal fibrosis,” concluded on October 1, 1998, that Claimant did not suffer from total respiratory disability. He recorded complaints of wheezing, dyspnea, productive cough and paroxysmal nocturnal dyspnea. DX-104. In a later report, dated November 3, 1998, Dr. Rashid, who is board-certified in internal medicine, concluded that Claimant does not suffer from a total respiratory disability, based on pulmonary function testing and a physical examination.⁸ DX-109. This opinion was repeated On February 4, 1999, when Dr. Rashid concluded, based on his review of other reports, normal pulmonary function testing and EKG, that Claimant was not disabled from working in the mines. DX-115.

Claimant was treated by Dr. Vo at the VA Hospital. Dr. Vo administered a pulmonary function test, which showed an obstructive and restrictive defect. Dr. Vo’s notes from March 26, July 9, and August 9, 1998 and also show a diagnosis of cor pulmonale. She does not render a disability assessment, although her treatment notes show wheezing, a productive cough, breathing medication and the use of oxygen. DXs-120, 121.

Claimant offered a brief opinion letter, dated March 7, 2000, from Dr. Kraynak in support of his December, 1999, request for modification. According to Dr. Kraynak, Claimant’s condition has worsened. His letter emphasized that he had been treating Claimant for some time. DX-153. Dr. Kraynak elaborated on his conclusions in deposition testimony recorded on July 21, 2000. CX-4. He vigorously defended the recent qualifying pulmonary function tests conducted by his office, stated that Claimant “has a history of cor pulmonale,” and concluded that Claimant is totally and permanently disabled by coal workers’ pneumoconiosis. CX-4 at 8-9.

⁸ Dr. Rashid initially grounded his conclusions on the ventilatory test, but later in the same report noted as bases both testing and the physical examination. DX-115.

Dr. Matthew J. Kraynak examined Claimant. In a letter, dated August 21, 2000, Dr. Kraynak opined that Claimant is “totally and permanently disabled” due to coal workers’ pneumoconiosis. He based this assessment on Claimant’s April 20, 2000 qualifying ventilatory examination, medical examination findings, history, and complaints. He noted that Claimant worked for 11 years in the mines, and that he is a non-smoker. CX-6.

Dr. Rashid examined Claimant on August 24, 2000. He detected no evidence of emphysema or chronic obstructive pulmonary disease. Reviewing a pulmonary function test, during which Claimant felt dizzy, an EKG and physical findings, Dr. Rashid concluded that Claimant does not have any disabling pneumoconiosis or pulmonary disease. DX-162.

Upon review of the medical opinion evidence as a whole, I find that Claimant has not met his burden of proving total pulmonary or respiratory disability at Section 718.204(c)(4). I am mindful of Drs. Kraynak’s and Mika’s status as treating physicians. I nevertheless credit Dr. Rashid’s most recent medical opinion, that Claimant is not totally disabled, on the basis of his credentials, the thoroughness of his report, and the clinical testing which forms some of the documentation in support of his conclusions. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

Certainly, there is a considerable body of medical opinion that Claimant suffers from a totally disabling pulmonary or respiratory impairment. Claimant’s case is supported not only by treating physicians, *see Mancina*, but also by the board-certified internists Drs. Greco and Kruk. Moreover, treatment notes from his visit to the VA Hospital to see Dr. Vo note an obstructive and restrictive lung defect, breathing medications and the use of oxygen. DX-121.

Reviewing the detailed findings and conclusions of Drs. Ahluwalia and Rashid,⁹ including the extensive use of pulmonary function, arterial blood gas, and exercise tests, I find that their opinions sufficiently undermine Claimant’s case so that the medical opinion evidence does not persuasively demonstrate total respiratory disability at Section 718.204(c)(4).

Total Respiratory Disability

After evaluating like-kind evidence under each provision of Section 718.204(c), I must then evaluate all relevant evidence at Section 718.202(c), like and unlike, to find whether Claimant has established total respiratory disability. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Upon consideration of all relevant evidence, like and unlike, including

⁹ Most recently, Dr. Rashid administered an EKG, as well as a ventilatory study. He was aware of Claimant’s complaints of wheezing, productive cough, and dyspnea, as well as Dr. Vo’s diagnosis of cor pulmonale. On physical examination of the chest, Claimant’s breath sounds were “resonant,” auscultation showed normal breath sounds and no rales or rhonchi. There was no acute distress before or during the performance of the pulmonary function study.

Claimant's testimony, *see generally Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1988); *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894, 13 BLR 2-348 (7th Cir. 1990), I conclude that Claimant has not met his burden of establishing total respiratory disability.

I find that the non-qualifying arterial blood gas studies, the valid, recent, non-qualifying pulmonary function study, the most recent medical report from Dr. Rashid, which is detailed, comprehensive and corroborated by earlier reports from Dr. Ahluwalia, constitute "contrary probative evidence" which precludes a finding of total respiratory disability pursuant to Section 718.204(c). Again, I have accounted for valid qualifying testing, multiple opinions from Claimant's treating physicians and board-certified internists, as well as a diagnosis of cor pulmonale. Nevertheless, I find, in the face of contrary probative evidence, that Claimant has failed to prove total respiratory disability by a preponderance of the record evidence. Although Claimant need only establish total disability by a preponderance of the evidence, "the preponderance standard is not toothless." *See United States v. Roman*, 121 F.3d 136, 141 (3d Cir. 1997), *cert. denied* 522 U.S. 1061 (1998).

Modification

I find, after a *de novo* review of the record as a whole, that Claimant has not proven that the prior determination, that he is not entitled to benefits, is mistaken. In the alternative, I also conclude, upon review of this evidence, especially the most recent medical reports and studies, that reopening this claim on the basis of the evidence filed in support of his request for modification would render justice under the Act. *See generally Hampton v. Cumberland Mountain Services Corp.*, BRB No. 99-0186 BLA (May 31, 2000) (unpub.). I am not persuaded that the extant record as a whole adequately supports the conclusion that Claimant's condition is worsening so that an evolution in his condition militates against finality in this instance. I further conclude that Claimant has failed to establish a change in conditions.

I hasten to emphasize that Claimant is not being penalized for filing requests for modification. I find, as a matter of fact, that Claimant's pursuit of modification is in good faith. *See generally Keating*. Indeed, pneumoconiosis is a progressive disease, and, as has been pointed out by the Fourth Circuit, "the health of a human being is not susceptible to once-in-a-lifetime adjudication." *Stanley*, 194 F.3d at 500 n. 4, 22 BLR 2-1.

Disability Causation

The final issue is whether Claimant has established disability causation at Section 718.204(b). Claimant bears the burden of proving that pneumoconiosis is a substantial contributor to Claimant's total respiratory disability. *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989). In this case, the record does not establish the existence of a totally disabling respiratory or pulmonary impairment. Assuming that Claimant had established total disability, I find that he has not convincingly established that pneumoconiosis is a substantial contributor to this total disability. Again, I credit the opinions of Dr. Rashid, that Claimant suffers from no pulmonary or respiratory impairment, on the basis of his superior credentials in the field of internal medicine.

CONCLUSION

Because Claimant has failed to prove total respiratory disability, I must conclude that he has failed to establish entitlement to benefits under the Act.

ORDER

The claim of PETER P. LAWSON for benefits under the Act is hereby DENIED.

A

Ainsworth H. Brown
Administrative Law Judge

Attorney Fees

The award of an attorney's fee under the Act is permitted only in cases in which Claimant is found to be entitled to benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to Claimant for services rendered to him in pursuit of this claim.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this decision and order may appeal it to the Benefits Review Board within 30 days from the date of this decision and order, by filing a notice of appeal with the Benefits Review Board at P.O. Box 37601, Washington, DC 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esq. Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, DC 20210.